In default of any rule to the contrary – and it will seldom, if ever, be that there is such a rule – when a member ceases to be a member of the association he ipso facto ceases to have any interest in its funds."

In *In re Sick and Funeral Society (supra)* the relevant date was December 31, 1966 when the Society ceased all its activities. Megarry J. held (at page 58) that:–

"In my judgment the substantive rights of all concerned crystallised on December 31, 1966 when in accordance with the resolution of December 12, 1966 the society ceased all its activities; . . . Accordingly, in my judgment, the personal representatives of each deceased member are entitled to the share to which that member would have been entitled had he lived."

Therefore in the present case the persons who would be entitled to the distribution would be –

(a) persons who were contributors (as defined in the Rules) as at July 31, 1981; and

(b) personal representatives or estates of persons who were contributors as at July 31, 1981 but who have since died.

The distribution shall be in proportion to the amount standing to the credit of each such contributor in the books of the Fund.

We would therefore dismiss the appeal and cross-appeal with costs but the order of the Judge shall be varied with regard to the proportion only to the extent as aforesaid. All costs shall be paid out of the Fund as agreed.

Appeal and cross-appeal dismissed.

Solicitors: *Skrine & Co.; Azman, Davidson & Co.; Shook Lin & Bok; Sri Ram, Zulkifly & Kumar.*

TIU SHI KIAN & ANOR. v. RED ROSE RESTAURANT SDN. BHD.

[O.C.J. (Wan Mohamed J.) July 19 & August 22, 1983]

[Kota Kinabalu – Civil Suit No. K419 of 1982]

Tort – Contempt of court in civil proceedings – Application to restrain defendants from disturbing plaintiffs' quiet use and enjoyment of premises – "Erinford Properties" type of injunction allowed by court – Closing of premises by defendants – Contempt of court

Company – Civil contempt of court – Associate company instrumental in breaching injunction – Lifting of corporate veil.

Practice and Procedure – Civil contempt of court – Plaintiffs instituting contempt proceedings – Court adding respondent of own motion – R.H.C. 1980, O.52 r.5.

The plaintiffs/applicants operated a nightclub and restaurant in licensed premises in Hotel Shangrila. The plaintiffs' application for an injunction dated November 24, 1982, to restrain the defendants from disturbing the plaintiffs' quiet use and enjoyment of the said premises and the equipment, furniture and fixtures therein and from removing the said equipment, furniture and fixtures, was dismissed on March 3, 1983. However, by a letter of the same date, the defendants had agreed to permit the plaintiffs continued operation of the premises. Contrary to the agreement, on March 6, 1983, the plaintiffs found the premises locked. Accordingly, on March 8, 1983, the plaintiffs applied for an "Erinford Properties" type of interim injunction on the same terms as their original application pending their appeal from the order dismissing the said application. The order was granted on March 14, 1983 and served on Albert Teo, the first respondent, on March 15, and on Datok Hong Sim Sui, the second respondent, on March 24 upon his return from Taiwan. Both Albert Teo and the third respondent, David U Kwok Fai, (whom the court cited as a respondent of its own motion) had knowledge of the order on the day of its making. On the nights of March 14 and 15, the plaintiffs were able to carry on their business at the premises but on the following night, March 16, the premises was again locked to them. Further, advertisements had appeared in the local newspapers of the same date advising the public of the closure of the said premises and the defendants' restaurant in the same hotel for renovation. The plaintiffs instituted proceedings against the 1st and 2nd respondents for civil contempt of court in breaching the order of March 14, 1983. The respondents contended that there could be no breach of an injunction which was impossible of observance as the said premises had been closed since the dismissal of the plaintiffs' application on March 3, 1983. Further, that the closure and the advertisements complained of were effected by a separate entity, Hotel Berjaya Sdn. Bhd., the owner of Hotel Shangrila. The defendant company and the respondents should not, therefore, be held responsible for such acts.

Held: (1) the following were the ingredients to found a case of civil contempt of court:

(i) the terms of the injunction must be clear and unambiguous;

(ii) the respondents must have proper notice of such terms;

(iii) there must be clear proof that the terms have been broken and breach must be proved beyond all reasonable doubts; and

(iv) proof of *mens rea* was not necessary;

(2) on the facts, all the necessary ingredients have been established. The plea that a separate entity, Hotel Berjaya Sdn. Bhd., was instrumental in breaching the order, would not exonerate the respondents as the defendant company and Hotel Berjaya Sdn. Bhd., though distinct entities, were

in fact one single authority. This was an appropriate case for lifting the corporate veil and the acts of the associate company would be deemed that of the defendant company;

(3) the respondents should be found guilty of contempt of court and fined accordingly.

Editorial Note:

[Appeal dismissed by Federal Court on August 24, 1984 but fines varied.]

Cases referred to:

(1) *Erinford Properties Ltd.* v. *Cheshire County Council* [1974] 2 All E.R. 448.
(2) *Iberian Trust Ltd.* v. *Founders Trust and Investment Co. Ltd.* [1932] All E.R. 176.
(3) *T.O. Thomas* v. *Asia Fishing Industry (Pte) Ltd.* [1977] 1 M.L.J. 151.
(4) *Re Bramblevale Ltd.* [1969] 3 All E.R. 1062, 1063.
(5) *Scottish Co-op Wholesale Society Ltd.* v. *Meyer* [1958] 3 All E.R. 66.
(6) *Hotel Jaya Puri Bhd.* v. *National Union Hotel, Restaurant Workers & Anor.* [1980] 1 M.L.J. 109, 112.
(7) *R.* v. *Odhams Press Ltd.* [1956] 3 All E.R. 494.

HIGH COURT.

Joseph Tang (*G. Math* with him) for plaintiffs.
C.I. Robertson for defendants.
Lim Kean Chye (*Joseph Lee* with him) and *Raja Abdul Aziz Addruse* for respondents.

Wan Mohamed J.: This is an appeal against my decision where I found the three respondents, namely, (1) Albert Teo, (2) Datuk Hong Kim Sui and (3) David U Kwok Fai guilty of committing a court contempt by openly defying a court order dated March 14, 1983. This is a civil court contempt proceeding brought about by the plaintiff applicants, namely, (1) Tiu Shi Kian, (2) Chan Jin Hong.

Briefly, the facts are as follows. On November 24, 1982, the applicants made an *ex parte* application praying for an order that Red Rose Restaurant by their servants or agents or otherwise be restrained from:—

(a) disturbing the applicants' quiet use and enjoyment of the Hotel Shangrila Night-club and Restaurant and the equipment furniture and fixtures therein;

(b) removing the equipment furniture and fixtures therein.

This application was heard on the same day and I granted only an interim injunction to cover the period from November 24 1982, until the return date. I fixed the return date on December 10, 1982, for the purpose of hearing arguments from both sides. In short, this interim injunction was granted solely to maintain the *status quo* of the parties pending argument and hearing of both parties. On December 10, 1982, the hearing was adjourned to December 16, 1982, for further arguments in open court.

On March 3, 1983, the decision was delivered where I dismissed the plaintiffs' application because from the material available they have failed to disclose that the applicants have any real prospect of succeeding in their claim for a permanent injunction at the trial. Immediately on the same day, a Notice of Appeal was filed. However, no *"Erinford Properties"* type of injunction was made on the same day due to the fact that the solicitors for the Defendants, i.e. Red Rose Restaurant, had allowed the applicants by a letter dated March 3, 1983, to continue to operate the demised premises as a night-club provided the applicants undertake to have the appeal fixed within two months. Messrs. Shelley Yap Leong Tseu Chong Chia & Co., as counsel for the applicants, agreed and they managed to have the appeal fixed in May 1983 when the Federal Court sits in Kota Kinabalu. However, two days later, i.e. on March 6, 1983, the demised premises was closed. As a result, on March 8, 1983, due to this closure of the premises, the applicants made a second application for an *"Erinford Properties"* type of injunction. This second application was heard on March 14, 1983, where I granted the application based on the principle as enunciated in the *"Erinford Properties"* case[1]. This order dated March 14, 1983, was immediately served on Red Rose Restaurant on the same day.

On the nights of March 14 and 15, 1983, the applicants were not prevented to enter into the demised premises to resume their night-club business. However, on March 16, 1983, the applicants could not continue their business for the simple reason that the demised premises was locked. Secondly, there were also advertisements appearing in local newspapers informing the public that Hotel Berjaya, as owner of the licensed premises, had closed the Golden Million Nite-club and Red Rose Restaurant for renovation purposes.

Clearly, on the face of it, the order dated March 14, 1983, had been breached. The person or persons responsible for the closure of the premises must therefore be guilty for contempt of court.

The law involved in civil contempt of court requires the following ingredients to be satisfied before a person could be found guilty of it:–

(1) The terms of the injunction must be clear and unambiguous. The relevant part of the order dated March 14, 1983, is as follows:

"It is ordered that the Defendants (i.e. Red Rose Restaurant) their servants or agents be restrained from disturbing the plaintiffs' quiet use and enjoyment of the Hotel Shangrila Night-club and Restaurant and the equipment furniture and fixtures therein; AND it is further ordered that the Defendants their servants or agents be restrained from removing the equipment furniture and fixtures therein."

The Respondents are charged that –

(a) since March 16, 1983, locked and prevented and still are locking and preventing the applicants from entering into the Golden Million Cabaret & Night-club at Hotel Shangrila;

(b) on March 16, 1983, closed and still are closing the business of the Golden Million Cabaret & Night-club;

(c) on March 16, 1983, publishing or causing to be published in the various issues of the local papers a notice to the effect that "Hotel Berjaya Sdn. Bhd., as owner of the hotel premises, had closed Red Rose Restaurant Sdn. Bhd. and Golden Million Cabaret & Night-club or words to the effect;

(d) as directors of Hotel Berjaya Sdn. Bhd. ("Hotel Berjaya") aided and abetted and still are abetting and aiding the Red Rose Restaurant in disobeying the order of the court since March, 1983;

(e) as directors of Red Rose Restaurant Sdn. Bhd. –

(i) acted and are still acting since March 16, 1983, in collusion with the Hotel Berjaya Sdn. Bhd. in committing the breach of injunction of March 14, 1983;

(ii) since March 16, 1983, allowed aided and abetted and still are allowing aiding or abetting the Hotel Berjaya Sdn. Bhd. in committing the breach of injunction of March 14, 1983.

The issue now is to consider whether the order dated March 14, 1983, is so clear and unambiguous that the above charges could be proved. In my view, I am satisfied that the order is not ambiguous and the contents of the charges had been duly proved by evidence as adduced by the respondents themselves during the cross-examination of their affidavits filed in court.

The learned counsel for the respondents had submitted in great length that the order is not clear at all and could be subjected to two interpretations. The gist of the argument lies in the fact that the order is for the preservation of a *status quo* that had already been destroyed or non-existing. To allow the applicants quiet use and enjoyment of the demised premises is impossible as the demised premises had already been closed since the court dismissed the applicants' first application dated November 24, 1982, on March 3, 1983.

In reply to this contention, the counsel for the applicants submitted that there is a *status quo* to be maintained. It is important to relate this point to the history of this case. The nature of the tenancy agreement made between the defendants and the applicants for the purpose of operating a night-club only requires the demised premises to be open from 8.00 p.m. till the night-club closed its business next morning usually at about 2.00 a.m. So each day the respondents or their workers would leave the main entrance of the licensed premises open and let the applicants and their workers enter and would lock the licensed premises each day after the night-club business hours. The injunction dated November 24, 1982, was in essence to restrain the respondents from locking the licensed premises from 8.00 p.m. each night until the business hour of the night-club is over. The *status quo* the applicants sought to preserve were a continuance of the night-club business and the employment of their workers which at any point of time was about one hundred.

The licensed premises though was under renovation after March 6, 1983, but was still capable of being used as a night-club though there might be some inconvenience. The order dated March 14, 1983, is similar to the earlier order where the respondents were restrained from locking up the premises. The *status quo* is to preserve the fixtures furniture and musical instruments in the licensed premises and also the business of the applicants.

I reject the argument of the respondents that there was no *status quo* to be preserved due to the fact that the demised premises was closed and renovation work had started prior to the order of injunction dated March 14, 1983, was made. *Status quo* in actual fact existed on March 14 and 15 when applicants could still operate the night-club business. Mr. David U, the Manager of Shangrila Hotel, in his evidence admitted that applicants had in actual fact operated the night-club on the nights of March 14 and 15, 1983. He and Albert Teo did not try to stop the applicants from carrying on the night-club business on

those two nights. The order of the court dated March 14, 1983, was unambiguous and clear. It could basically be obeyed by the respondents by just allowing the applicants to operate the business of the night-club as on March 14 & 15, 1983. Cases relied on this point are *Iberian Trust Ltd.* v. *Founders Trust and Investment*[2]; *T.O. Thomas* v. *Asia Fishing Industry (Pte) Ltd.*[3].

(2) The second ingredient is that the respondents must have proper notice of such terms. From the affidavits of service, I am satisfied that the respondent, Albert Teo, was served as a director of Red Rose Restaurant on March 15 & 17, 1983, and the respondent, Datuk Hong, was served as a director of Red Rose Restaurant on March 24, 1983, after his return from Taiwan. The affidavit of Albert Teo affirmed on March 31, 1983, marked as "RA. 1" at para. 7 admitted that he was informed by the Defendants' solicitors about the order on the same day on March 14, 1983. Datuk Hong in his evidence also stated that after he received a copy of the order he went to see his solicitors. As such, I am also satisfied that the second ingredient has also been satisfied.

(3) The third ingredient is that there must be clear proof that the terms have been broken and breach must be proved beyond all reasonable doubt.

> "A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt." – per Lord Denning in *Re Bramblevale Ltd.*[4] at page 1063.

The first respondent, Albert Teo, in his evidence and affidavit ("RA. 1") in para. 3, 9, and 11, stated that it was the owner of Hotel Shangrila, i.e. Hotel Berjaya, who prevented the plaintiffs from operating their night-club business on the licensed premises on March 6, 1983. He also stated in para. 14 that the Defendants, Red Rose Restaurant, were no more in possession of the licensed premises on March 16, 1983. As such, the respondents should be exonerated from all liabilities. Upon cross-examination in connection with "RA. 1", Albert Teo referred to a telephone conversation between him and Datuk Hong on March 5, 1983, while the latter was still in Taiwan. He said he was instructed by the latter to close the licensed premises but Albert Teo refused to act accordingly. Datuk Hong then spoke to David U, the Manager of Hotel Shangrila, to close the licensed premises as from March 6, 1983. David U then closed the premises on March 6, 1983. However, this is only a breach of the undertaking between the parties. It is not in breach of a court order.

The counsel for the applicants submitted that Red Rose Restaurant was in fact never dispossessed of the licensed premises although some renovation had been carried out. If the Red Rose Restaurant had been dispossessed of it, there is no reason as to why the Defendants should spend about $0.3 million on the renovation.

Albert Teo in his affidavit affirmed on March 31, 1983, admitted that the Defendants had carried out the renovation although this was disputed by Datuk Hong who in his evidence when cross-examined by counsel for the applicants said, "I did not know if it was carried out by Red Rose Restaurant" when he was asked, "Do you agree with Albert Teo who said that Red Rose Restaurant Sdn. Bhd. was the one which caused the renovation to be done?" He answered, "I don't know that but it should be Hotel Berjaya Sdn. Bhd." From his reply I find that Datuk Hong was not sure whether the renovation of the licensed premises was not caused to be done by Red Rose Restaurant. It is observed from his demeanour that Datuk Hong was not telling the truth and he was evasive in giving replies to even very straightforward and simple questions put to him by the counsel for the applicants.

When the order of injunction dated March 14, 1983, was on the same day served on Albert Teo, the applicants, i.e. Golden Million Cabaret and Night-club, were not restrained from operating the night-club business for the following two nights, although not under very comfortable conditions. This clearly indicates that the night-club business could still continue until the appeal is heard. The respondents in this case had not allowed this state of affairs to continue. On March 16, 1983, the respondents, Albert Teo and David U, had with malice shown an animosity against the applicants and daringly took steps in defying the court order when they locked up the demised premises and thereby prevented the applicants from operating the night-club business. They also caused the advertisement to be published. I would repeat that had they continued to allow the applicants to continue operating the night-club business until the appeal was heard in May 1983, then there would have been no contempt of court.

The respondents had attempted to mask themselves by making use of Hotel Berjaya Sdn. Bhd. to

say that the Red Rose Restaurant was dispossessed of the licensed premises and thereby pleaded that the Defendants (Red Rose Restaurant) were helpless and had nothing to do with the licensed premises at the material time. Having explained and understood that the two corporate bodies are in fact one single authority, I find it is just like the right hand telling the left hand to commit an act with the hope that the right hand will not be blamed for it. This sort of device should not be allowed to defeat justice. I therefore find that the mask is not only transparent but porous.

It is noted that all the three respondents had consulted their respective solicitors when the order of the injunction was served on them before taking any step which led to the closure of the licensed premises. However, it is not clear to the court as to whether the locking of the licensed premises and the taking of steps in advertising the closure of the night-club were the direct consequence of the advice given by the solicitors. If it is proved that the respondents had acted in the manner stated above in accordance with the advice given to them by the solicitors concerned, the court shall not hesitate to rope in such solicitors for abetting the breach of the court order as in the case of *T.O. Thomas* v. *Asia Fishing*[3].

I find it as of fact that Hotel Berjaya Sdn. Bhd. and Red Rose Restaurant are actually a "two-in-one" and "one-in-two" entity. The real issue to be decided is whether this court will lift the corporate veil of these two statute-created entities. The principle enunciated in the *Scottish Co-op Wholesale Society Ltd.* v. *Meyer*[5] held that the court will look at the *business realities* of a situation and does not confine them to a narrow legalistic view in lifting the corporate veil. In *Hotel Jaya Puri Bhd.* v. *NUH Bar & Restaurant*[6] at page 112 the court held that –

"(1) the hotel and the restaurant were interdependent;

(2) there was a functional integrity and unity of establishment between the hotel and the restaurant. In other words, functionally the hotel and the restaurant are in fact one integral whole and management-wise they also constitute a single unit..."

In my view, by adopting the tests as laid down in the Scottish case where the court must look at the business realities of a situation plus the functional integrality approach as enunciated in the *Hotel Jaya Puri case,* I am satisfied that Red Rose Restaurant and Hotel Berjaya are actually in this particular case "one single entity". Management-wise there is also unity as the directors of Hotel Berjaya are also directors of the Red Rose Restaurant.

(4) The last ingredient in civil court contempt proceeding is the proof of *mens rea.* This had been settled in the case of *R.* v. *Odhams Press Ltd.*[7] where no *mens rea* need to be proved.

ALBERT TEO CHIN KION

The court has to be satisfied beyond reasonable doubt that Albert Teo is responsible for violating the injunction order dated March 14, 1983, before holding him guilty for contempt of court. From the affidavits sworn by him and the applicants' affidavits filed in court and after considering his oral evidence given at the hearing of this matter, I am satisfied that the above requirement had been fulfilled. He had only tried to impress upon the court that he was helpless and was unable to comply with the order of the court. But it is found as of fact that the Red Rose Restaurant was never dispossessed and that it was within his power to comply with the order of court. Therefore, Albert Teo failed in trying to exonerate himself. Secondly, the publication of the advertisement on March 16, 1983, was done with the full knowledge and consent of Albert Teo as testified by David U, the general manager of Shangrila Hotel.

In conclusion, I find him guilty for contempt of court and I fine him a sum of $10,000/–; in default five months' imprisonment, and fine to be paid within three days.

DATUK HONG KIM SUI

He came back to Kota Kinabalu from Taiwan on March 23, 1983. After his return, he was immediately served with the court order dated March 14, 1983. It is immaterial in my view whether he has knowledge of the order when he was in Taiwan. He claimed that he was not consulted nor informed on any developments or about the renovations or the closure of the licensed premises from March 6 – 23, 1983. He was served with the order of injunction on March 24, 1983. On that day he knew that the licensed premises was locked and the applicants were deprived from operating the night-club. He also knew that the closure was advertised in the local newspapers and he took no steps to comply with the order of court dated March 14, 1983, and in fact allowed the breach to be continued until the date of hearing of this matter. Datuk Hong being the Managing Director of the

defendant company (Red Rose Restaurant) and Hotel Berjaya Sdn. Bhd. which caused the breach of the court order, himself admitted that he could have complied with the order of court. He had done nothing to comply with the order of the court but instead allowed the breach to be continued. It is therefore clear that he is guilty for contempt of court. I fine him a sum of $6,000/–; in default three months' imprisonment. The fine to be paid within three days.

DAVID U KWOK FAI (General Manager of Hotel Berjaya)

The court on its own motion and pursuant to O.52, r.5 of the Rules of the High Court 1980 issued a Notice of Motion dated June 24, 1983, against David U to show cause as to why he should not be committed for his several contempts of this court upon the following grounds:–

(a) According to his testimony at the hearing for committal of Datuk Hong and Albert Teo on May 5, 1983, he admitted he was the one who closed the Golden Million Cabaret & Night-club as from March 16, 1983;

(b) He admitted in the same hearing that he on March 16, 1983, caused to be published in the various issues of the local papers a notice to the effect that Hotel Berjaya Sdn. Bhd., as owner of the hotel premises, had closed Red Rose Restaurant Sdn. Bhd. and Golden Million Cabaret & Night-club;

(c) He admitted when such advertisement was made he had knowledge of the order of the court dated March 14, 1983.

The above acts amount to contempt of court. David U had deprived the plaintiffs from operating the Golden Million Cabaret & Night-club which amounts to disturbing the plaintiffs' quiet use and enjoyment of the licensed premises.

The counsel for the respondents had submitted that there is no evidence to show beyond reasonable doubt that David U closed the premises on March 16, 1983. In reply to this, I refer to my Notes of Proceedings, page 16-B, where David U himself expressly stated in the cross-examination, "I was the one who caused the night-club to be closed as from March 16, 1983 ....."

The above acts amount to contempt of court. David U had deprived the plaintiffs from operating the Golden Million Cabaret & Night-club which amounts to disturbing the plaintiffs' quiet use and enjoyment of the licensed premises.

Learned counsel for David U also submitted that there was no *status quo* to be preserved at the time the order dated March 14, 1983, was given due to the fact that the licensed premises were already closed since March 4, 1983. I have already dealt in detail earlier and gave my reason why I cannot accept the above contention. There was in fact *status quo* to be preserved which David U intentionally violated.

In page 16-D of my Notes of Proceedings, David U had himself admitted by saying, "I was the one who caused the notice as in para. 18 of Chan Jin Hong's affidavit ("RA. 1") to be inserted in the newspapers." Above all, David U admitted that he knew of the contents of the court order dated March 14, 1983. Another defence raised was that David U merely acted on the instructions of his directors. David U cannot exonerate himself from being liable for contempt of court just because he is acting on an instruction of a director or directors when he fully knew that there was an order of the court which forbade anyone from disturbing the quiet use and enjoyment of the licensed premises by the plaintiffs.

As such, I am satisfied that David U had failed to show cause as to why he should not be guilty of the charges made against him. I find him guilty of committing a civil court contempt. I fine him $6,000/–; in default three months' imprisonment. Fine to be paid within three days from today.

Sentenced accordingly.

Solicitors: *Shelley Yap Leong & Seu Chong Chia & Co.; Skinner Lind Robertson Pang Willie & Co.; Joseph Lee & Co.*

PUBLIC PROSECUTOR v. HUN PENG KHAI & ORS.

[R.Cr.J. (Edgar Joseph Jr. J.) June 4, 1984]
(Penang – Criminal Revision No. 3 of 1984]

Dangerous Drugs – Offence under s.39B of Dangerous Drugs Act, 1952 – Effect of amendment – Whether amendment has retrospect effect – Dangerous Drugs Act, 1952, ss. 39B(1) & 41(1) – Dangerous Drugs (Amendment) Act, 1983, ss. 15 & 16.